

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7453

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-7453

KAHLMAN LINKER and DYNAMISMM,
Plaintiffs-Appellants,
v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., DEAN
WITTER & CO., INC., GOLDMAN SACHS & CO., WALTER F.
BAUER, WERNER L. FRANK, FRANCIS V. WALKER, and all
other executive officers and directors of INFORMATICS, INC.,
as of February 27, 1974. HENRY J. SMITH, former Chairman
and Director, and all other directors of the EQUITABLE LIFE
ASSURANCE SOCIETY OF THE UNITED STATES, as of February
27, 1974. THE EQUITABLE LIFE HOLDING CORP., and all others
whom discovery may show should be named.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANT-APPELLEE MERRILL
LYNCH, PIERCE, FENNER & SMITH, INC.**

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Statement of the Case

On August 10, 1976 the Plaintiffs-Appellants herein filed
the Complaint in the United States District Court for the
Southern District of New York. The case was assigned to
Judge Henry Werker.

Various procedural maneuvers followed, in which Defendant Merrill Lynch was not a participant.

Upon reading the Complaint (Defendant's Appendix, p. 1 *et seq.*) it became clear to Defendant Merrill Lynch that Plaintiff Linker did not own stock in the company at the time of the alleged wrong and that Plaintiff Dynamismmm was not a *de jure* corporation. Other defects also become apparent. For this reason, said Defendant served a Motion to Dismiss the Complaint (see Exhibit D of the Appendix).

The Motion was rendered moot when the Court *sua sponte* dismissed the Complaint. It is significant to note that the Court based its decision on many of the same points raised by Defendant Merrill Lynch's Motion.

Statement of the Issue

There is only one issue on this appeal: Did Judge Werker have sufficient legal basis to dismiss the Complaint.

In other words, was the Complaint, on its face, so patently defective as to warrant such an unusual and final action? It is respectfully submitted that the Court's decision was clearly justified and proper under the circumstances.

ARGUMENT ON BEHALF OF MERRILL LYNCH, A DEFENDANT-APPELLEE

POINTS I through IV

In the interest of brevity, Defendant Merrill Lynch incorporates by reference and adopts all of the points and arguments set forth in its Affidavit and Memorandum of Law in Support of the Motion to Dismiss filed in the District Court below and set out at pages 30a to 41a in the Appendix.

POINT V

Where a Pleading is Patently Defective There is No Need to Have a Hearing or Give Notice of a Motion *Sua Sponte*

By definition, a motion *sua sponte* is one made without notice (Black's Law Dictionary, 4th Ed., p. 1592). Appellant Linker's argument that the proceedings at the September 8 conference (see Appellant's Brief, p. 14) were "star-chamber" hearings is not based on the facts; it is based on a misconception of law and state of mind which borders on paranoia.

The Appendix contains a transcript of this conference. Beginning at page 46a, Mr. Linker explained his case for four pages without interruption. On the fifth page, Judge Werker asked a question which demonstrates that he was paying attention to what Mr. Linker had to say.

Mr. Linker was then allowed to continue for two more pages before the Court interrupted again.

The questions put to Mr. Linker by the Court at that point clearly show that Judge Werker was listening to him and had read the Complaint.

The answers Mr. Linker gave (see page 52a) in and of themselves supplied sufficient legal grounds for a Motion to Dismiss.

After all of the Defendant's attorneys were given an opportunity to speak, the Court gave Mr. Linker the chance to reply. Mr. Linker went on for two more pages.

Finally, Judge Werker *sua sponte* dismissed the Complaint based on "what I heard today" (p. 60a of the Appendix).

Mr. Linker's assertion that he was given "extremely little opportunity to answer" (Appellant's Brief, p. 14) is just not true. The conduct of Judge Werker was not only fair to Mr. Linker but was, in my opinion, very courteous and patient.

Judge Werker made no "charges" against Mr. Linker. The Court asked simple, direct questions in a normal tone of voice.

The answers to these questions confirmed the existence of the patent defects in the Complaint and clearly warranted the action which was taken by the Court. *Hamilton against Jamison* 355 F. Supp. 290 (1973); *Literature, Inc. v. Quinn* 482 F2d 372 (1973); *Dodd against Spokane County* 393 F2d 330 (1968).

POINT VI

The Complaint is Incurably Defective and Ought to be Dismissed

Regardless of the nature of the September 8 conference, or any other consideration, the Complaint, as reinforced by Mr. Linker's own statements that day, clearly shows that 1) Linker did not own stock in the company at the time of the alleged wrongful acts (see Appendix p. 52a, lines 23 through 25); and 2) Dynamism is identical to Mr. Linker (see Appendix p. 52a, lines 18 through 22).

Hence, neither Plaintiff had any interest recognized by law at the time of the alleged wrongful acts and hence is without standing to sue. These defects are incurable. There is no amendment to the Pleading which will change these facts. *Hamilton against Jamison supra*, at p. 298.

CONCLUSION

The dismissal of the complaint by a motion *sua sponte* was correct in law and in fact and ought to be affirmed.

Respectfully submitted,

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